

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 19

DESCHUTES FOODS INCORPORATED  
d/b/a ERICKSON'S SENTRY MARKET

Employer

and

Case 36-RC-6203

TEAMSTERS LOCAL 962 affiliated with  
the INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS AND JOINT COUNCIL #37

Petitioner

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record<sup>1</sup> in this proceeding, the undersigned makes the following findings and conclusions<sup>2</sup>:

**Summary**

The Employer operates six grocery stores in central Oregon including its store in Redmond ("Store"). The Petitioner filed the instant petition on March 24, 2003, seeking to represent certain employees employed by the Employer at the Store. In its brief, the Employer frames the sole issue in this matter to be whether the office manager, Arlene Gresser, should be excluded from the unit as a confidential employee. The Employer contends Gresser is a confidential employee and, therefore, should be excluded from the unit. The Petitioner contends Gresser is not a confidential employee and, thus, is properly included in the unit. Based on the record as a whole, I conclude that Gresser is not a confidential employee. Accordingly, I shall include Gresser's position in the unit.

Below, I have set forth the facts, as revealed by the record in this matter, a legal analysis and the direction of an election.

---

<sup>1</sup> The Employer filed a timely brief, which was duly considered. The Petitioner did not file a brief.

<sup>2</sup> The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed; the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein; the labor organization involved claims to represent certain employees of the Employer and; a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

## **1.) Facts**

Larry Eck manages the Store, which structurally occupies approximately 14,000 to 15,000 square feet. Eck has managed the Store for about five months, but previously worked at the Employer's Prineville, Oregon, grocery store for almost eight years. Assistant Manager Adam, whose last name is not reflected in the record, assists Eck by participating in personnel issues including hiring and disciplinary decisions for grocery employees. In the deli department, personnel issues, including hiring decisions, are handled by Anna Kay whose title and work location is not clear. It is also not clear to whom Kay reports. Eck reports to the Employer's General Manager, Doug Schmidt, who oversees the Employer's six grocery stores. Schmidt visits the Store once or twice a week and also communicates with Eck over the phone at least once a week.

Arlene Gresser is the Employer's bookkeeper and scanning coordinator.<sup>3</sup> Gresser was hired as a bookkeeper approximately four years ago. The scanning duties were added to her duties about one year ago. Gresser generally works alone in an office in the front of the store. At times, Eck also works in this office to be near customers, but has his own office in the back of the store. Gresser's office has two desks and three computers – she uses two of the computers for pricing and the third one for accounts payable. She and Eck are the only ones in the store with access to these computers and she is the only one who uses them. It is unclear if Eck has his own computer in his office. Gresser ensures the office door is locked on Fridays when paychecks come in; otherwise, the office remains open. In addition, Gresser assists customers, answers the telephone, and does some grocery checking when needed.

Gresser's duties include maintaining the personnel records in an unlocked file cabinet in her office. These files contain applications, W-2 forms, and vacation requests. Gresser is also in charge of bookkeeping, payroll, accounts payable, opening mail, hanging advertising signs and adjusting product pricing in accordance with information she receives weekly from United Grocers or monthly from suppliers. Gresser testified that Schmidt comes in the store once or twice a month during which time she provides him with bank account and sales information. On a monthly basis, she sends information to the Employer's accountants. Gresser also has access to workers' compensation claims, bank statements, the gross margins on products, and sales figures. Gresser has typed letters for Eck including letters of recommendation, a memo to employees regarding scheduling, and memos to vendors instructing them on where to place their products. She has not written any letters regarding disciplinary, hiring, or termination issues. However, Eck testified that Gresser would do any typing that he needed including letters of reprimand.<sup>4</sup> Gresser testified she does not attend management meetings and that Eck does not discuss personnel issues with her.

## **2.) Analysis**

The issue presented by the parties is whether Gresser is a confidential employee who should be excluded from the unit sought by the Petitioner. "Confidential employees" are defined as employees who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies with regard to labor relations, or regularly substitute for employees having such duties. Under Board policy, confidential employees are excluded from the bargaining unit. *Ladish Co.*, 178 NLRB 90 (1969); *Chrysler Corp.*, 173 NLRB 1046 (1969); *Eastern Camera Corp.*, 140 NLRB 569, 574 (1963); *B. F. Goodrich Co.*, 115 NLRB 722, 724 (1956); *Hampton Roads*

---

<sup>3</sup> In its brief, the Employer refers to Gresser as the office manager. However, Gresser testified that her position was the bookkeeper/scanning coordinator. There is no evidence contradicting this testimony.

<sup>4</sup> Eck testified that in his last store, the department heads merely filled out disciplinary forms as opposed to typing up reprimands.

*Maritime Assn.*, 178 NLRB 263 (1969); *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 188-189 (1981); *B.F. Goodrich Co.*, 115 NLRB 722, 724 (1956). The Board has always held these indicia are in the conjunctive. *Holly Sugar Corp.*, 193 NLRB 1024 (1971). Further, the Supreme Court affirmed the Board's alternate test that confidential employees are those who have regular access to confidential information "concerning anticipated changes which may result from collective-bargaining negotiations." *NLRB v. Hendricks County Rural Electric Membership Corp.*, supra (omitting citations). The party asserting such confidential status carries the burden of proof. *Crest Mark Packing Co.*, 283 NLRB 999 (1987). Based on the record as a whole, I find the Employer failed to meet this burden.

The Employer contends in its brief, that Store Manager Eck will be relying on Gresser to "draft proposals and counterproposals and provide him with confidential bargaining information." However, the record simply does not provide evidence that Eck's duties and/or responsibilities currently or will in the future include drafting bargaining proposals and counter proposals. The Employer's brief also states that Gresser "coordinates all workers' compensation claims." The only record testimony on Gresser's connection with workers' compensations claims is that she will answer questions regarding the status of such claims when "they" call with no definition to the term "they."<sup>5</sup> In short, because the record does not establish that Gresser assists or acts in a confidential capacity to a person who actually formulates, determines and effectuates management policies in the field of labor relations, I find that Gresser does not fall within the definition of confidential employees as that term is defined by the Board. *Telephone Utilities of Alaska*, 308 NLRB 918 (1992).

Moving on to the alternate test for confidential employees status, the record evidence does not support a finding that Gresser has regular access to confidential information directly related to the formulation of the Employer's labor relations policies. The Board has long held that an employee's mere access to financial and payroll records, including information regarding competitors, which might eventually be used by the Employer in labor negotiations is not enough to confer confidential status. *Brodart, Inc.*, 257 NLRB 380, 384 fn. 10 (1981); *Dinkler-St. Charles Hotel*, 124 NLRB 1302 (1959); *Swift & Co.*, 129 NLRB 1391 (1961). Nor does access to personnel files or mail confer confidential status. *The Bakersfield Californian*, 316 NLRB 1211 (1995). Further, none of the items that Gresser actually types are of a confidential nature. *Id.* The record reflects that Gresser has not yet typed disciplinary notices for Eck. However, even if Gresser had typed disciplinary notices, this routine act does not establish her as a confidential employee. *Id.* As I noted above, there is no evidence that Eck would be the designated Employer representative regarding labor relations matters. Thus, testimony that Gresser would, in the future, assist Eck or some other official in confidential labor relations matters is merely speculative at this point and, thus, not dispositive.<sup>6</sup> *American Radiator & Sanitary Co.*, 119 NLRB 1715 (1958). Based on the above and on the record as a whole, I conclude that Gresser is not a confidential employee under the Act and is, therefore, included in the Unit.

On the basis of the foregoing and the record as a whole, I shall direct an election be held in the following appropriate unit:

---

<sup>5</sup> I also note that record is silent regarding Eck's connection with workers' compensation and/or Gresser's interaction with any other managers or supervisors in this regard. At the hearing in this matter, the Employer failed to define what the term "coordinates" means. That is, does the Employer contend that Gresser independently formulates, determines and effectuates management policies in the field of labor relations or does the Employer contend that Gresser assists or acts in confidential capacity to a person who actually formulates, determines, etc. In short, the Employer simply has failed to carry its burden of proof in this regard.

<sup>6</sup> Should there be an actual change in circumstances, that is, a change from speculation to reality, a unit clarification petition may be filed to address such a change.

All full-time and regular part-time checkers, meat cutters, meat wrappers, produce clerks, persons-in-charge, bookkeeper/scanning coordinator, deli clerks and courtesy clerks, and all other clerks employed by the Employer at its Redmond, Oregon store; excluding all bakery employees, the deli manager, meat manager, assistant manager, store manager, confidential employees, guards and supervisors as defined by the Act, and all other employees.<sup>7</sup>

There are approximately 20 employees in the Unit.

### **3.) Direction of Election**

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible to vote are deli and courtesy clerks who average 8 hours per week during the months of February, March and April, 2003, and who have not quit or been discharged for cause since becoming eligible. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike, which commenced less than 12 months before the election date, employees engaged in such strike, who have retained their status as strikers but who have been permanently replaced as well as their replacements, are also eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Teamsters Local 962, affiliated with the International Brotherhood of Teamsters and Joint Council # 37.

### **A.) List of Voters**

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the alphabetized full names and addresses of all the eligible voters, must be filed by the Employer with the Officer-in-Charge for SubRegion 36 within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. The SubRegion shall, in turn, make the list available to all parties to the election.

---

<sup>7</sup> The Unit description is in substantial accord with the parties' agreement in this regard. However, I have made changes to clarify the individuals who are subject to the 8-hour requirement. In this regard, I removed the eligibility formula from the unit description and placed it in the paragraph under the heading "Direction of Election" where the eligibility language is normally located. Also, I have included standard Board language ("full-time and regular part-time") to comply with the Board's general rule that regular part-time employees are included in the unit with full-time employees. *Fleming Foods*, 313 NLRB 948 (1994). *Pat's Blue Ribbons*, 286 NLRB 918 (1987); *Farmers Insurance Group*, 143 NLRB 240, 245 (1979).

In order to be timely filed, such list must be received in the SubRegional Office, 601 SW Second Ave., Suite 1910, Portland, OR 97204-3170, on or before May 9, 2003. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission to (503) 326-5387. Since the list is to be made available to all parties to the election, please furnish a total of 4 copies, unless the list is submitted by facsimile, in which case only one copy need be submitted.

**B.) Notice of Posting Obligations**

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

**C.) Right to Request Review**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by May 16, 2003.

**DATED** in Seattle, Washington, this 2<sup>nd</sup> day of May 2003.

---

Catherine M. Roth, Acting Regional Director  
National Labor Relations Board, Region 19  
2948 Jackson Federal Building  
915 Second Avenue  
Seattle, WA 98174

177-2401-6800